Supreme Court, U.S.
FILED
93113 JAN 10 1994
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MANNIE CHAPMAN, *et al.*,
Petitioners,

v.

HERMAN M. KLEMICK, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

HOWARD S. SUSSKIND *
ALICE WEISMAN
SUGARMAN & SUSSKIND, P.A.
5959 Blue Lagoon Drive
Suite 150
Miami, Florida 33126
(305) 264-2121
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Is Klemick a "fiduciary" as that term is defined in ERISA?

2. Were the settlement monies within Klemick's control "plan assets"?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs: Mannie Chapman, Jimmie Erskine, Dorothy Reid, James L. Woodall, R.P. Vinall, and Diane L. Ragone, as Trustees of the Laborers Health and Welfare Trust Fund of South Florida.

Defendants: Herman M. Klemick and Herman M. Klemick, P.A.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Facts	2
B. Proceedings Below	4
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	6
APPENDIX A	
Opinion of the U.S. Court of Appeals for the Eleventh Circuit	1a
APPENDIX B	
Memorandum Opinion of the U.S. District Court for the Southern District of Florida	10a
APPENDIX C	
Order on Motion to Amend or Alter Final Judgment of the U.S. District Court for the Southern District of Florida	19a
APPENDIX D	
Memorandum of Decision in *Teamsters Industrial Security Fund v. Salgado*, Case No. CV 92-7082 MRP, Aug. 26, 1993 (unpublished)	23a
APPENDIX E	
Text of Statutes and Regulations Involved	30a

TABLE OF AUTHORITIES

Cases:	Page
Chapman v. Klemick, 750 F. Supp. 520 (S.D. Fla. 1990)	1
Chapman v. Klemick, 3 F.3d 1508 (11th Cir. 1993)	1
Pugh v. Wilson, 693 F. Supp. 1096 (S.D. Fla. 1988)	4
Teamsters Industrial Security Fund v. Salgado, No. CV 92-7082 (C.D. Cal. Aug. 26, 1993)	5
Statutes:	
28 U.S.C. § 1254(1)	1
Employee Retirement Income Security Act,	
Section 3(1) and (21)(A), 29 U.S.C. § 1002 (1) and (21)(A)	2
Section 409(a), 29 U.S.C. § 1109(a)	2
Section 502(e)(1), and (f), 29 U.S.C. § 1132 (e)(1), and (f)	2, 4
29 C.F.R. § 2509.75-5	2
Rule 4-1.7(b) and 4-1.15(c), Florida Rules of Professional Conduct	2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No.

MANNIE CHAPMAN, *et al.*,
Petitioners,

v.

HERMAN M. KLEMICK, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners Mannie Chapman et al. pray that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is reported at 750 F. Supp. 520 (S.D. Fla. 1990), and is set forth at pages 10a to 18a of the appendix (App. 10a-18a). The opinion of the Court of Appeals is reported at 3 F.3d 1508 (11th Cir. 1993) and is set forth at pages 1a to 9a of the appendix (App. 1a-9a).

JURISDICTION

The Court of Appeals issued its opinion on October 12, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED[1]

Employee Retirement Income Security Act ("ERISA"),

Section 3(1) and (21)(A), 29 U.S.C. § 1002(1) and (21)(A).

Section 409(a), 29 U.S.C. § 1109(a).

Section 502(e)(1), and (f), 29 U.S.C. § 1132(e)(1), and (f).

29 C.F.R. § 2509.75-5 (1986).

Rule 4-1.7(b) and 4-1.15(c), Florida Rules of Professional Conduct.

STATEMENT OF THE CASE

A. Facts

Petitioners are the Trustees of the Laborers Health and Welfare Trust Fund of South Florida ("Trust Fund"). The Trust Fund is an "employee welfare benefit plan" as defined by Section 3(1) of ERISA, 29 U.S.C. § 1002(1).

Frank Wilson, Jr., a participant of the Trust Fund, suffered personal injuries. He retained the professional services of Herman Klemick, Esquire, of Herman M. Klemick, P.A., to assist him in recovering compensation from the tortfeasor's insurance carrier. Wilson incurred medical expenses in excess of $28,000.00, which he sought to have the Trust Fund pay. Prior to releasing the funds, however, the Trust Fund required him to sign a subrogation agreement stating that the Trust Fund would be reimbursed should he recover any compensation for his injuries by suit, settlement, or otherwise. After reading the subrogation agreement to Klemick by telephone, Wilson signed the agreement. Thereafter the Trust Fund paid

---

[1] Pursuant to Rule 14.1(f), Rules of the Supreme Court of the United States, petitioners merely cite the statutes and regulations here and set forth the pertinent text in the appendix (App. 30a to 40a).

in excess of $28,000.00 in medical expenses on Wilson's behalf.

Following negotiations with the tortfeasor's insurance carrier, Klemick received a check for $25,000.00 made out jointly to Wilson and him. Klemick asked the Trust Fund to waive its right to subrogation, but the Trust Fund declined. Klemick stated to the Trust Fund that he would never recommend that his client voluntarily turn over all the settlement funds that he had recovered. He also stated that he would advise his client not to agree to pay the Trust Fund, even though he agreed that there was legal support for the Trust Fund's claim, and that it was most probable that the Trust Fund could recover on a claim against Wilson.

Klemick further indicated that he had conceived of a plan by which, even if the Trust Fund sued Wilson and obtained a judgment against him for the amount of money recovered in the settlement, the Trust Fund would be frustrated in its attempts to collect. He explained that if, during the time it took the Trustees to obtain the judgment, the settlement proceeds were all spent, there would be nothing against which the Trustees could enforce their judgment. Any garnishment or lien problems which the Trustees' judgment might cause Wilson could, Klemick stated, be avoided by a bankruptcy which would discharge his liability on the judgment. This would preclude the Trustees from recovering the amounts to which the Trust Fund was otherwise entitled.

A few days after Klemick's conversation with the Trust Fund, Klemick and Wilson endorsed the check. Klemick deposited the entire amount in the Herman M. Klemick, P.A. Trust Account, and made out a check to Wilson for $15,431.50. Klemick then paid himself $8,333.00 as his attorney's fee and applied the balance to offset costs.

Ten days later, the Trust Fund filed a complaint and application for a temporary restraining order to enjoin Wilson from spending the funds. In an emergency hearing

on that application, Wilson informed the district court that he had already spent all of the money. The Trust Fund obtained a judgment against Wilson for the full amount of the settlement plus $21,659.00 in attorney's fees. See *Pugh v. Wilson*, 693 F. Supp. 1096 (S.D. Fla. 1988). The validity of that judgment against Wilson is not at issue in this case, but Wilson's assets were insufficient to satisfy the judgment against him.

B. Proceedings Below

The Trust Fund sued Klemick, alleging that he had become an ERISA fiduciary because Wilson's insurance settlement became "Trust Fund assets" by operation of the subrogation agreement, and that Klemick had breached his fiduciary duty to the Trust Fund by disposing of plan assets in his control.

The district court had jurisdiction pursuant to Section 502(e)(1), and (f) of ERISA, 29 U.S.C. § 1132(e)(1), and (f). The case came before the district court on cross-motions for summary judgment. The district court granted the Trust Fund's motion and denied Klemick's, finding Klemick liable for breach of fiduciary duty under ERISA.

The Eleventh Circuit reversed the district court's finding that Klemick was a fiduciary and remanded the case to the district court with instructions to enter judgment in favor of Klemick.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision raises an important question of federal law that this Court should resolve. As the Eleventh Circuit noted, the issue of fiduciary liability of an attorney hired by a plan participant had not previously been addressed by the federal courts.

The district court's decision in *Chapman v. Klemick* was, however, relied upon by a district court within the

Ninth Circuit prior to the Eleventh Circuit's reversal of that decision. In *Teamsters Industrial Security Fund v. Salgado,* No. 92-7082, slip op. (C.D. Cal. Aug. 26, 1993), the district court found that a personal injury attorney who represented a plan participant was a fiduciary. [The unpublished decision in this case is set forth at pages 23a to 29a of the appendix. (App. 23a to 29a)] Following the *Klemick* rationale, the court found that the attorney had breached his fiduciary duty to the plan by disbursing settlement funds received to his client, without reimbursing the fund in accordance with a subrogation agreement between the fund and the attorney's client. The *Salgado* decision highlights the importance of the issue involved in the *Klemick* case, and the interest in resolution of this issue by ERISA trust funds around the country.

The Eleventh Circuit decision was flawed in several respects. The court argued that imposing fiduciary status on attorneys in this kind of case would work to the detriment of ERISA trust funds. The petitioners in this case, trustees of an ERISA plan, strongly disagree. Petitioners believe that the Eleventh Circuit decision will inevitably harm plan participants and weaken ERISA plans. This decision encourages personal injury attorneys to advise their clients that subrogation provisions in ERISA plans may be ignored with impunity and to ignore such provisions themselves when distributing settlement funds.

The Eleventh Circuit also opined that Attorney Klemick could not be a plan fiduciary because he would then owe conflicting fiduciary duties to both his client, Wilson, and to the Trust Fund. The Court cited Rule 4-1.7(b) of the Florida Rules of Professional Conduct, prohibiting competing allegiances. The Court ignored, however, another Florida Rule of Professional Conduct, Rule 4-1.15(c), requiring the safekeeping of monies about which there is a dispute over ownership. The Comments on that rule explicitly recognize that an attorney may have a duty to protect third party claims by refusing to surrender prop-

erty to his client. The Comments also suggest that, in such a situation, the lawyer should consider depositing the funds into the registry of the appropriate court so that the matter may be adjudicated. This is precisely the position taken by the district court in the decision below with regard to Klemick's obligation to the Trust Fund as well as to Wilson, his client.

The Eleventh Circuit's opinion, while focusing upon a Florida Rule of Professional Conduct, completely ignored ERISA's broad definition of "fiduciary." Nor did the Court make any functional analysis of Klemick's actions with regard to plan assets. By focusing instead on Klemick's "sacred" duty of loyalty to his client, the Eleventh Circuit has issued an opinion which contravenes the statutory language and congressional intent underlying ERISA. Moreover, this decision is extremely damaging to the continued viability of ERISA trust funds, as it eviscerates the ability of ERISA plans to enforce subrogation articles and agreements.

The questions of federal law at stake here are so crucial to the continued ability of ERISA trust funds to protect their assets for the benefit of fund participants that this Court should decide them.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

HOWARD S. SUSSKIND *
ALICE WEISMAN
SUGARMAN & SUSSKIND, P.A.
5959 Blue Lagoon Drive
Suite 150
Miami, Florida 33126
(305) 264-2121
Attorneys for Petitioners

* Counsel of Record